85-2028

Supreme Court, U.S.
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No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

DANTE GILL, a/k/a TEX GILL,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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58pp

QUESTIONS PRESENTED

1. Where an order granting immunity commands that a witness not be excused from testifying in deposition or affidavit or to an agent of the IRS or an Assistant United States Attorney or before the grand jury on grounds of self-incrimination or forfeiture, and the court of appeals found said order "Under the circumstances of this case . . . posed a threat to the integrity of the judicial process. We therefore find that this procedure was improper." did not the court of appeals err in failing to grant relief from the flagrant abuse of process evident from said order?

2. Where lay witnesses are allowed to guess at the average minimum customers of massage parlors and then guess at average minimum prices charged, which figures are then multiplied by 363 days per year, does not the geometric distortion caused by such multiplication outweigh the evidentiary value of the opinion so as to require the granting of a new trial?

3. If an IRS officer accompanies city police officers who he had previously instructed on matters to be searched for in connection with IRS investigations but who testified he did not have probable

cause to secure a search warrant on behalf of the IRS, does not the turning over of all the documents seized by the city police officers to the IRS agent the day after their seizure constitute a violation of the "silver platter" doctrine and require suppression of said evidence?

STATEMENT PURSUANT TO RULE 21(b)

In addition to the parties listed in the caption of the case in this Court the party before the United States Court of Appeals for the Third Circuit in a separate appeal based upon the same fact situation was Cynthia T. Bruno, a/k/a Cynthia Gill.

The within petition is filed on behalf of Dante Gill, a/k/a Tex Gill, an individual.

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No. _____

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In the
SUPREME COURT OF THE UNITED STATES

_____

_____Term, 1986

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DANTE GILL, a/k/a Tex Gill,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

_____

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

Petitioner, Dante Gill, a/k/a Tex Gill, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not been officially reported, is set forth below at A-1.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1986. The petition for rehearing was denied May 6, 1986. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTES

18 U.S.C.A. § 371, which provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both."

26 U.S.C.A. § 7206(1) and (2) pro-

vide:

Any person who --

(1) Declaration under penalties of perjury. -- Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance. -- Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other documents, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document;

18 U.S.C. § 6003(a) provides:

"In the case of any individual who has been or may be called to testify or provide other

information at any proceeding before or ancillary to . . . a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in Section 6002 of this part."

FEDERAL RULES OF EVIDENCE INVOLVED

Rule 701, Opinion Testimony by Lay Witnesses. If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rule 801, Definitions. The following definitions apply under this article.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if --

(2)(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

Petitioner Dante Gill was indicted for conspiring to evade taxes; aiding in the preparation of a false return; and personal income tax evasion. After approximately a five-week trial, petitioner was adjudged not guilty of personal income tax evasion and one count of corporate false return and was found guilty of conspiracy and other counts of false corporate returns. She was fined a total of $30,000.00 plus costs of prosecution and sentenced to seven years imprisonment with five years' probation to follow.

REASONS FOR GRANTING THE WRIT

I.

During the trial, counsel for petitioner, for the first time, was made aware of the fact that an order of immunity compelling the prime witness against petitioner to testify contained requirements in the order which are not encompassed by 18 U.S.C. § 6001 et seq. The order compelled the witness to give a deposition and to forthwith accompany the United States Attorney for the purpose of cooperating with the IRS agents and/or the United States Attorney's office. The order in its entirety is quoted in the panel opinion. (A-10-A-12, fn. 2) The panel decision of the Court of

Appeals for the Third Circuit (A-25) states:

> We therefore conclude that the deposition procedure, although improper under the circumstances of this case, did not constitute the kind of flagrant abuse that might warrant a severe remedial measure even in the absence of actual prejudice. Because we find no actual prejudice to the defendants, we therefore shall not dismiss the indictment. Although we have stayed our hand, we note our disapproval of the taking of Ms. Jones's deposition in lieu of her appearance before the grand jury; the deposition procedure employed in the circumstances of this case raises questions of infringement upon the powers of the grand jury. The district court therefore should not have provided for the deposition in its § 6002 order.

Bonnie Jones' deposition was taken over a three-day period; took over 20 hours and consisted of over 580 pages. At the deposition counsel

for the witness stated that her appearance at the deposition was not voluntary. Three IRS agents were present at the taking of the witness' deposition under the immunity order and furnished her with records which had been subpoenaed and were part of the secret grand jury proceedings, thus violating Rule 6(e) of the Federal Rules of Criminal Procedure. The deposition was later read to the indicting grand jury. The notes of the deposition were stamped that it was being taken under the Federal Rules of Civil Procedure for discovery or use at trial.

Many other witnesses testified at the trial and produced grants of

letter immunity from the United States Attorney. A district court judge has held that pocket immunity is illegal, "a damnable practice" and that the only proper grant of immunity is pursuant to 18 U.S.C. § 6001 et seq. United States v. Kilpatrick 575 F. Supp. 325 (D.C. Colo. 1983), 514 F. Supp. 1324 (D.C. Colo 1984); United States v. Anderson, 577 F. Supp. 223 (D.C. Wyo. 1983); United States v. John Doe, 79 L.Ed.2d 552 (1984), 104 S.Ct. 1237 (1984). The compelling of a civil deposition in the case of Bonnie Jones allowed IRS agents to accumulate evidence and interrogate the witness so as to produce the projections of alleged income which is the subject of the evidentiary matter

presented to the court in question 2 for consideration. In addition, the letters of immunity given by the United States Attorney to witnesses produced the incriminating evidence against the petitioner allowing the petit jury to speculate on the guesstimates that were then provided.

It is respectfully submitted that the order of court granting immunity is a flagrant abuse of the immunity statute since there is absolutely no color of authority for the commands contained in said order. Since it was a flagrant abuse of process by the court below and by the United States Attorney's office which secured the order, the court of appeals erred in

failing to grant any relief, a new trial or the dismissal of the indictment, by reason thereof.

II.

The second issue and reason for granting the writ is that the panel opinion approves of the testimony of witnesses as a reasonable basis on which to calculate deficiencies. The panel opinion declares that the opinion of a lay witness may be admitted under Federal Rule of Evidence 701 or as the declaration of a co-conspirator under Federal Rule of Evidence 801(d)(2)(E). The latter rule could not possibly be applicable to the instant fact situation since that Rule defines an exception to the

hearsay rule as the declaration of a co-conspirator made during the course of and in furtherance of the conspiracy. There was never any suggestion in the court below that the statements of Bonnie Jones were offered as those of a co-conspirator made during the course of the conspiracy and in furtherance thereof nor would such an argument have made any sense. The testimony of Bonnie Jones was compelled by an order of immunity and a command to give a deposition and appear at the trial of this case. It is obvious that such coerced testimony cannot be during the course of and in furtherance of the conspiracy and thus is not an exception to the hearsay

rule and Rule 801 has no applicability to her testimony. Thus, the applicability of Federal Rule of Evidence 701 is the only basis for the allowance of the opinion of Bonnie Jones and other attendants at massage parlors. Each of the witnesses was permitted to guess at the average number of patrons of massage parlors during various shifts and then to guess at the average service selected for which payment was made, thus giving an average of number of patrons times amounts paid. That figure was then multiplied by 363 days per year to attempt to establish gross receipts of corporations. The multiplication of the guesstimates by 363 days per year creates a geometric distortion

which is so prejudicial that under the Federal Rules of Evidence the balance test should have required sustaining the objection and not allowing the guesstimates into evidence. The slightest error in the guesstimates of the witnesses if they were off by $10.00 per session and a ten percent in numbers of patrons the resultant error is in excess of $380,000.00. That is roughly the amount which the government contended the massage parlors had underestimated their income on the returns.

The court below allowed the guesstimates and an IRS agent would in open court use a calculator to multiply the guesstimates as furnished by the witness on the stand, thus

creating the impression that the guesstimates were being reduced to a mathematical certainty rather than a geometric distortion.

Rule 701 admonishes the court that the opinion of lay witnesses is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of the fact in issue. The perception of each witness was no more than a guess as to the alleged facts testified to, namely, that on three different shifts where the witness would only work one shift the average number of patrons of a massage parlor was a given number

and the average charge per customer was another given number, both of which were alleged average minimums. As above stated, since the averages were then multiplied by 363 days a year as if those averages occurred on every day, the margin of error is so great that a trial court in using a balancing test should have excluded the testimony as mere guesstimates and not lay opinions. If Rule 701 is construed and permitted to stand as applied by the court below, it is respectfully submitted that there is no rule of evidence relating to lay opinion testimony in federal court trials.

III.

The original records of petitioner were seized by city police officers. The city police officer in charge of the seizure was one who had been instructed on matters to be searched for in connection with IRS investigations by an IRS agent who he asked to accompany him on the execution of the state search warrant. The IRS agent testified that he did not have probable cause to secure a search warrant of petitioner's residence nor to secure the records which were seized by the city police officer. The night of the execution of the search warrant the IRS agent accompanied the city police officers to the Public Safety Building and reviewed

the records and the next day handed the city officer a grand jury subpoena and removed all of the records to the federal courthouse. The testimony at the trial established that at no time were any of the records which were turned over to the IRS agent and later to the grand jury ever requested or required by the city police officers in the performance of their state investigation process.

In Elkins v. United States, 364 U.S. 206 (1960), it was held that:

"Evidence obtained by state officers during a search which, if conducted by federal officers would have violated defendant's immunity from unreasonable search and seizures, is inadmissible in a federal criminal trial."

The court condemned the "silver platter" doctrine for the reason that it would invite federal officers to at least tacitly encourage state officers to disregard the constitutionally protected freedom. There was no authority for the IRS agent in charge of the investigation of petitioner to accompany city police officers on the execution of a search warrant against petitioner other than to secure evidence which the IRS agents could not otherwise obtain. After the evidence had been microfilmed, they were later returned to attorney for petitioner but the microfilm copies led to evidence of checking accounts and other matters which allowed the IRS agents to build

their case against petitioner. Many of the documents so seized were shown to Bonnie Jones by the IRS agents during her deposition, outside of the grand jury room although they had been subpoenaed by the grand jury. None of the exceptions which have been established by this Court to unconstitutional searches and seizures are applicable under this fact situation because the IRS agent was not acting in good faith since he knew that he could not secure an IRS warrant because he did not have probable cause. Nor was it established that the evidence would have been inevitably discovered or that the government would have learned of the evidence from other independent sources. Under the doctrine of Wong

Sun v. United States, 371 U.S. 471 (1963), the motion to suppress should have extended to the indirect as well as the direct fruits of the invasion of petitioner's privacy by the execution of a search warrant by city officers for the purpose of turning the evidence over to federal IRS agents.

CONCLUSION

The petition for certiorari should be granted so that this Court may review the abuse of immunity powers by the court below as well as the unauthorized use of pocket or letter immunity, the former having been held by the court of appeals panel to have been a threat to the integrity of the judicial process. The fact situation

in this case also furnishes an opportunity to refine the extent to which Rule 701 of the Federal Rules of Evidence will allow lay opinion testimony when they are mere guesses and especially where they are subject to such geometric distortion when multiplied by factors far outweighing their probative value. Finally the issue of allowing federal IRS agents to accompany city police officers to seize and secure evidence which the IRS admits it did not have probable cause to seize and secure should be reviewed and condemned by this Court.

Respectfully submitted,

HAROLD GONDELMAN

Attorney for Petitioner

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-3010, 85-3018 & 85-3021

UNITED STATES OF AMERICA,

Appellee

v.

DANTE GILL, CYNTHIA BRUNO,
RAYMOND OSHOP,

Appellants

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Crim. No. 84-67)
District Judge: Gustave Diamond

Argued October 28, 1985

BEFORE: GARTH and BECKER, Circuit Judges, and HUYETT, District Judge *

(Filed Apr 9, 1986)

MEMORANDUM OPINION OF THE COURT

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* Honorable Daniel H. Huyett, 3rd, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

BECKER, Circuit Judge.

These appeals are from judgments of conviction in the United States District Court for the Western District of Pennsylvania. Appellant Dante ("Tex") Gill was found guilty on one count of conspiring to defraud the United States by impeding, impairing, obstructing and defeating the collection of taxes, 18 U.S.C. § 371 (1982); on three counts of knowingly aiding and assisting in the preparation and presentation of false and fraudulent corporate income tax returns, 26 U.S.C. § 7206(2) (1982); and on one count of knowingly making and subscribing a corporate income tax return that she did not believe to be true and correct,

26 U.S.C. § 7206(a) (1982). The gravamen of the government's case was that Ms. Gill had failed to report on her income tax returns much of the income she had earned from the operation of a chain of massage parlors in the Pittsburgh area that were "covers" for prostitution activities. Ms. Gill was sentenced to imprisonment for thirteen years, subject to conditions that effectively reduced the prison sentence to five years, with five years' probation to follow. She was also fined a total of $30,000, plus costs of prosecution.

Appellant Cynthia Bruno, an employee of Ms. Gill, was found guilty on one count of conspiracy under 18

U.S.C. § 371. She was sentenced to two years' imprisonment, with a minimum of three months to be spent in actual confinement, and five years' probation to follow. Appellant Raymond Oshop, an accountant employed by Ms. Gill, was found guilty on one count of conspiracy under 18 U.S.C. § 371 and two counts of knowingly aiding and assisting in the preparation and presentation of false and fraudulent corporate income tax return forms, 26 U.S.C. § 7206(2). He was sentenced to a total of four years' imprisonment, which was reduced to three years upon his meeting certain conditions; he too was given a probation term of five years. He was also

fined $15,000, plus costs of prosecution.

Appellants raise a number of other contentions, all of which we find unconvincing. Specifically, we conclude that the documents used to indict and convict the appellants were not the products of an illegal search and seizure, for we find that the magistrate had probable cause to issue a warrant to search Ms. Gill's home; that the Pittsburgh police officers' search was properly limited to the areas described in the warrant; and that these officers' handing over of legally seized evidence to federal officers did not violate the "silver platter" doctrine. Because we find

that the evidence was legally seized, there is no "fruit of the poisonous tree" problem.

Furthermore, we do not find prosecutorial misconduct in the grant of letter immunity, the showing of documents that had been subpoenaed by the grand jury to witnesses outside the grand jury, or the presentation to the grand jury of witnesses whose counsel had advised them to take the fifth amendment. Finally, we believe that the government had a reasonable basis on which to calculate the deficiency in the appellants' taxes; that Bonnie Jones's testimony on this issue was properly admitted either as the opinion of a lay witness, Fed. R. Evid. 701, or

as the declaration of a co-conspirator, Fed. R. Evid. 801(d)(2)(E); and that the government's use of charts for the purpose of illustrating the deficiency was not prejudicial.

We turn to a brief consideration of the one remaining issue: whether the district court erred in permitting an Assistant United States Attorney and Internal Revenue Service agents to depose Bonnie Jones, a government witness who had received a grant of immunity, in lieu of having her appear before the grand jury.

I.

During the investigative stage of this case, the grand jury issued a subpoena requiring Bonnie Jones to testify

before it. When Ms. Jones appeared before the grand jury, she invoked her fifth amendment right against self-incrimination. The government thereupon sought from the district court a grant of immunity pursuant to 18 U.S.C. § 6002 et seq. (1982). 1/ Before the government sought the § 6002 order, it had come to an agreement with Ms. Jones that Ms. Jones would not have to appear before the grand jury, but would instead be deposed by an Assistant United States Attorney. Ms. Jones preferred this procedure primarily

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1. It is undisputed that the government followed the correct procedure for obtaining statutory immunity.

because her counsel was allowed to attend this interview. Presumably, she also felt that the deposition procedure would be less stressful than an appearance before the grand jury.

In response to the government's request, the district court entered an order stating that the witness would not be excused from testifying "in deposition or affidavit form to an agent of the IRS or an Assistant United States Attorney, or before a Federal Grand Jury, or at any trials which may result from the Grand Jury's inquiry." The court further ordered that Ms. Jones should "return with an Assistant United States Attorney forthwith either to provide a deposition or affidavit or

return to the Grand Jury room and answer all questions propounded" to her. Id. 2/ Ms. Jones was thereupon deposed in the presence of her attorney by three Special Agents of the IRS. The transcript of the interview was sealed and eventually read to the grand jury in its entirety. Ms. Jones testimony played a key role in the indictment and subsequent conviction of the appellants.

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2. The order states in its entirety:

> Bonnie Jones:
>
> It is the order of this Court, in accordance with the provision of Sections 6002 and 6003 of Title 18, United States Code, that you shall

On appeal from their convictions, appellants argue that because 18 U.S.C. § 6001 et seq. does not expand the forums in which a witness may be compelled to testify, and because the United States

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(Footnote 2 continued)

> not be excused from testifying in deposition or affidavit or to an agent of the IRS or an Assistant United States Attorney, or before the Grand Jury, or at any trials which may result from the Grand Jury's inquiry on the ground that the testimony or evidence required of you may tend to incriminate you or subject you to a penalty of forfeiture.
>
> However, no testimony or other information compelled under this order (or for any information directly or indirectly derived from such testimony or other information) may be used against you in any criminal case, except a prosecution for perjury, giving a

Attorney had no subpoena power, the taking of the deposition was improper. They contend that a civil deposition without notice to the target of the investigation, where no civil proceeding is

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(Footnote 2 continued)

> false statement, contempt, or otherwise failing to comply with this order.
>
> It is therefore the Order of this Court that you shall return with an Assistant United States Attorney forthwith either to provide a deposition or affidavit or return to the Grand Jury room and answer all questions propounded to you, as well as in any subsequent proceeding or trial which may result from the Grand Jury's current inquiry.

pending, cannot be substituted for grand jury process. Such substitution, they assert, constitutes grand jury abuse justifying a dismissal of the indictment.indictment.

II.

The responsibilities of the grand jury "include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions." United States v. Calandra, 414 U.S. 338, 343 (1974). When the ability of the grand jury to reach an independent determination of probable cause has been infringed, this Court may dismiss an indictment. See United States v

Serubo, 604 F.2d 807 (3d Cir. 1979). Indeed, we have approved of the severe sanction of dismissal of an indictment even when the abuse has caused no actual prejudice to the defendant, that is, when the defendant would have been indicted even if the abuse had not occurred. Id. However, to trigger dismissal in such cases, there must be a finding of "flagrant or persistent abuse." Id. at 817.

Some doubt has been cast upon our ability to dismiss indictments for grand jury abuse by a recent decision of the Supreme Court, United States v. Mechanik, 54 U.S.L.W. 4167 (1986). In Mechanik, the Court reversed the dismissal of an indictment for violation of Fed. R. Crim. P. 6(d), which

limits the persons who may be present at a grand jury proceeding. The Court held that even if the grand jury's charging decision had been affected by the Rule 6(d) violation (that is, even if the procedure had created actual prejudice to the defendant) the subsequent conviction by the petit jury nullified the earlier prejudice, rendering the Rule 6(d) violation harmless error. Mechanik stops short of ruling that an indictment may never be dismissed for error in the grand jury proceeding after a petit jury has returned a guilty verdict against the defendant, for the Court emphasized the fact that the Mechanik trial was well advanced before counsel brought the Rule 6(d) violation to the attention of

the district court. However, we need not determine the scope of Mechanik in this case, for we find that although the deposition procedure was improper, it neither caused actual prejudice to the defendants nor constituted a flagrant abuse of the grand jury process. We now turn to a discussion of the deposition procedure.

III.

It is undeniable that the testimony of Ms. Jones was very significant both at the grand jury proceeding and at trial. We realize that hearsay evidence may be presented to a grand jury, see Costello v. United States, 350 U.S. 359 (1956), and that grand juries often receive evidence through affidavits. In this case, however, an

important witness initially appeared before the grand jury and later, after invoking her fifth amendment privilege, agreed to a deposition in lieu of another appearance. No compelling reason was given to justify the "deal" that was made between Ms. Jones and the prosecutors in this case. Under the circumstances of this case the deposition procedure posed a threat to the integrity of the judicial process. We therefore find that this procedure was improper. We must now consider whether the deposition procedure caused actual prejudice to the defendants. The procedure was prejudicial if the indictment would not have been issued had the challenged procedure not been

employed. In other words, might the indictment have been the result of the challenged procedure?

In answering this question, we find guidance in United States v. Samango, 607 F.2d 871 (9th Cir. 1979), which also involved the submission to the grand jury of a transcript in lieu of oral testimony. In Samango, the grand jury had reviewed transcripts of testimony given before prior grand juries. The Ninth Circuit stated that the prosecutor should have attempted to present live testimony from the witness, who was in custody, thereby enabling the grand jury to observe his demeanor and determine on its own

whether he was a credible witness. Id. at 882 3/ It affirmed the district court's dismissal of the indictment because it found that "the manner in which the prosecution obtained the indictment represented a serious threat

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3. In connection with this observation, the Samango court quoted the following passage from United States v. Gallo, 394 F.Supp. 310 (D. Conn. 1975):

> At a minimum, the government attorney was obligated to provide some guidance as to how jurors should utilize the . . . transcripts in determining whether or not an indictment should be returned. To be sure, the jurors realized that they were not going to hear from a live witness. Yet, it cannot be assumed that they possessed the

to the integrity of the judicial process." Id. at 885.

Several factors distinguish Samango from the case at bar. In Samango, the lengthy transcripts of the prior grand jury proceedings were merely deposited with the grand jury that issued the indictment. The record did not show how much time the jurors spent reading the transcripts and there were indications in the record that some of the jurors were not familiar

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(Footnote 3 continued)

> astuteness to evaluate properly the reliability and trustworthiness of the hearsay evidence.

394 F. Supp. at 315.

with the contents of the transcripts at all. Furthermore, the prosecutor failed to warn the grand jury of the witness's doubtful credibility, nor did he inform the jurors that they could subpoena live testimony. In this case, there is no question that all the grand jurors knew the contents of the transcript of Ms. Jones's deposition because it was read to them. Moreover, there was no serious question as to Ms. Jones' credibility. Thus, the absence of an opportunity for the grand jury to observe her demeanor did not signifi-cantly curtail its ability to make an intelligent assessment of probable cause. We therefore find that the taking of the deposition caused no actual prejudice to the defendants.

Nor do we find that the abuse was sufficiently flagrant to warrant a dismissal of the indictment in the absence of actual prejudice (assuming that such a course is available after Mechanik). We have criticized "the use of grand jury subpoenas as a ploy for the facilitation of office interrogation." United States v. DiGillio, 538 F.2d 972, 85 (3d Cir. 1976). However, the alleged misconduct in this case is considerably less serious than the overreaching in DiGillio for two reasons. 4/ First, Ms. Jones was

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4. In DiGillio, FBI agents, after fruitlessly questioning defendant Lupo at his place of business, served a forthwith subpoena issued in blank directing him to appear before the grand jury that afternoon. The agents also told him to go to the Federal courthouse at once. While at the

interrogated only after her grand jury appearance, at which she invoked the fifth amendment. The prosecutor then obtained an immunity order from a district judge that allowed the taking of a deposition by the United States Attorney in lieu of an appearance before the grand jury. There was no

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(Footnote 4 continued)

courthouse, Lupo made self-incriminating statements. FBI agents likewise served defendant Szwandrak at his home with a forthwith grand jury subpoena identical to that served on Lupo. They required him to accompany them to the offices of the Organized Crime Strike Force and the United States Attorney, where he made incriminating statements prior to his grand jury testimony. We found that the subpoenas were misused because they were employed as a means of "facilitating investigatory interrogation outside the presumably protective presence of the grand jury." Id.

such judicial oversight in DiGillo Second, it is significant that Ms. Jones agreed to the deposition prior to the issuance of the order and that she gained some benefit from it: the presence of her counsel at the questioning, as well as a release from the presumably more stressful situation of grand jury interrogation. Moreover, because this Court had not previously found fault with the procedure in question here, the use of it cannot be said to constitute flagrant abuse of the grand jury procedure. Indeed, we would not find a deposition practice objectionable had the grand jury itself directed that it be utilized, for the grand jury's autonomy would not then have been infringed. Cf.. United

States v. Smith, 687 F.2d 147, 151 (6th Cir. 1982) "[[T]he evil to be avoided in the interrelationship between the grand jury and the United States Attorney is the prosecutor's usurpation of the grand jury's authority to direct subpoenaed individuals to provide information or evidence.").

We therefore conclude that the deposition procedure, although improper under the circumstances of this case, did not constitute the kind of flagrant abuse that might warrant a severe remedial measure even in the absence of actual prejudice. Because we find no actual prejudice to the defendants, we therefore shall not dismiss the indictment. Although we have stayed our hand, we note our disapproval of the

taking of Ms. Jones's deposition in lieu of her appearance before the grand jury; the deposition procedure employed in the circumstances of this case raises questions of infringement upon the powers of the grand jury. The district court therefore should not have provided for the deposition in its § 6002 order.

The judgment of the district court will be affirmed.

TO THE CLERK:

Kindly file the foregoing opinion.

/s/ Edward R. Becker
Circuit Judge

DATED:

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3010

UNITED STATES OF AMERICA,
Appellee

vs.

DANTE GILL, CYNTHIA BRUNO, RAYMOND OSHOP, et al.

DANTE GILL,
Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, Circuit Judges, and HUYETT, District Judge*

The petition for rehearing filed by Appellant Dante Gill, No. 85-3010, in the above-entitled case having been submitted to the Judges who participated in the decision of this court and to all the other available circuit Judges

of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Edward R. Becker

Judge

Dated: May 6, 1986

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* As to panel rehearing only.